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Jaime W. Marquart (State Bar No. 200344)

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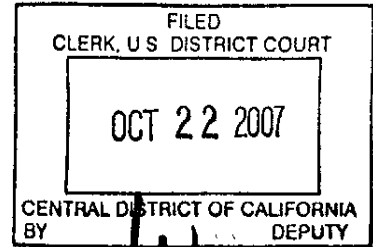
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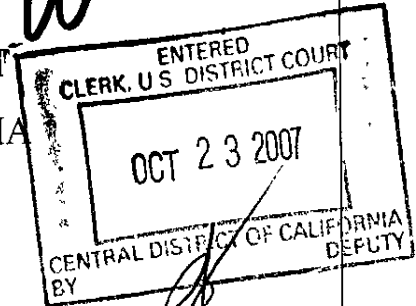
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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION



ALBERT M. ZLOTNICK, an individual,

Plaintiff,

vs.

COAST CAPITAL PARTNERS, LLC,
and DOES 1 through 50, inclusive,

Defendants.

Case No. CV07-783R (JTLx)

Hon. Manuel L. Real

**STATEMENT OF
UNCONTROVERTED FACTS AND
CONCLUSIONS OF LAW IN
SUPPORT OF COAST CAPITAL
PARTNERS, LLC'S MOTION FOR
SUMMARY JUDGMENT**

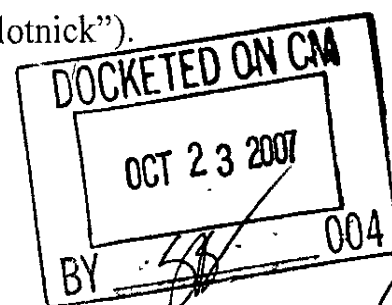
[Local Rule 56-1]

Date: October 15, 2007

Time: 10:00 a.m.

Defendant Coast Capital Partners, LLC ("CCP"), pursuant to Federal Rule of Civil Procedure 56(a) and Local Rule 56-1, submits this Statement of Uncontroverted Facts and Conclusions of Law in support of their Motion for Summary Judgment against Albert Zlotnick ("Zlotnick").

THIS CONSTITUTES NOTICE OF ENTRY
AS REQUIRED BY FRCP, RULE 77(d).



54

I.

UNCONTROVERTED MATERIAL FACTS

CONTINUED

UNCONTROVERTED FACTS	SUPPORTING EVIDENCE
<p>1. CCP is a hard-money secured lender based in New Jersey. Its primary business model is to extend mostly senior, fully-secured loans to troubled or transitional businesses at relatively high interest rates.</p>	<p>Declaration of Walter Craig, filed concurrently herewith ("Craig Dec."), ¶ 2.</p>
<p>2. In or around March, 2000, CCP began lending money to various movie production and distribution entities controlled by Charles Band ("Band"), a Los Angeles producer of horror films. The entities controlled by Band ("Band Entities") include, among others, Full Moon Universe, Inc. (two distinct entities by that name, one based in California and the other in Washington), iSurrender.com, and Shadow Entertainment.</p>	<p>Craig Dec., ¶ 3.</p>
<p>3. The original March 2000 loan agreement between CCP and Full Moon Universe was amended over time, and CCP also made additional loans to other Band Entities such as Shadow Entertainment over time.</p>	<p>Craig Dec., ¶ 3.</p>

1	4. Essentially all of CCP's loans to Band	Craig Dec., ¶ 3.
2	Entities were secured by all of the assets of	
3	the Band Entities.	
4		
5	5. CCP's loans to the Band Entities were also	Craig Dec., ¶ 3.
6	personally guaranteed by Band from their	
7	inception which guaranty was secured by real	
8	estate owed by Band.	
9	6. CCP recorded its senior liens by filing	Craig Dec., ¶ 4.
10	UCC financing statements with the California	
11	Secretary of State as well as copyright	
12	mortgages against the films.	
13		
14	7. The Band Entities ultimately defaulted on	Craig Dec., ¶ 5.
15	the loans to CCP, and CCP obtained a	
16	judgment of \$2.3 million against the Band	
17	Entities in Coast Capital Partners, LLC, et al.	
18	v. Full Moon Universe, Inc., et al., Superior	
19	Court of New Jersey (Monmouth County)	
20	Case No. L-4206-05.	
21		
22	8. Shortly after CCP began making loans to	Zlotnick's First Amended
23	the Band Entities, plaintiff Albert Zlotnick	Complaint in Los Angeles
24	("Zlotnick") and Band contemplated a	Superior Court Case No.
25	sophisticated reverse merger transaction in	BC262183 ("Band FAC"),
26	which one of Band's companies,	dated May 1, 2002, ¶¶ 14-
27	iSurrender.com, would merge with a public	16, attached as Ex. B to
28		

1 2 3 4	shell corporation provided by Zlotnick, to form a production company with access to the public capital markets.	CCP's Request for Judicial Notice filed concurrently herewith.
5 6 7 8 9 10 11 12	9. As of 2000, Zlotnick was an experienced investor with approximately forty-three years of experience in investment banking, and had conducted approximately fifty corporate finance transactions.	Deposition of Albert M. Zlotnick dated July 27, 2007 ("Zlotnick Tr.") at pp. 19:4-12; 27:10-13, Declaration of Jaime Marquart ("Marquart Dec."), Ex. B at 33, 35.
13 14 15 16	10. As part of the reverse merger scheme, Zlotnick agreed to provide bridge loans to certain of the Band Entities.	Band FAC ¶¶ 14-16, CCP's Request for Judicial Notice Ex. B.
17 18 19 20 21 22 23 24 25	11. Zlotnick testified that shortly after lending certain of the Band Entities approximately \$1.5 million, he learned of the CCP loan. At such time, Zlotnick testified that his only knowledge of CCP came from Band, whom Zlotnick had started to distrust, because Band "wasn't living up to his previous assertions and promises."	Zlotnick Tr. at pp. 46:11-47:15; 67:15-25; 236:7-9, Marquart Dec., Ex. B at 36-37, 49, 72.
26 27 28	12. In fact, Zlotnick testified that his discovery of the CCP loan was one of the	Zlotnick Tr. at pp. 49:7-50:3, Marquart Dec. Ex. B

1	things that caused him "to question Mr.	at 37A and 37B.
2	Band's integrity."	
3		
4	13. Zlotnick concedes that CCP's liens on	Final Pretrial Conference
5	Band Entity assets are senior to his own.	Order dated September 10,
6		2007 at p. 6:15-19,
7		Marquart Dec. Ex. C at
8		126.
9		
10	14. On January 22, 2001, Zlotnick's counsel	Deposition of James
11	sent a memorandum to Zlotnick attaching	McShane dated August 15,
12	various financial statements. The	2007 ("McShane Tr.") at
13	memorandum stated: "[w]ith regard to your	pp. 28:4-24 and Ex. 64
14	knowledge of the Coast Capital Partners	thereto, Marquart Dec. Ex.
15	secured loan, there is no specific reference in	E at 212, 265.
16	the Share Exchange Agreement or the	
17	Promissory Note as to whether or not the	
18	loan is secured."	
19		
20	15. On or about June 11, 2001, Zlotnick's	Zlotnick Tr. at pp. 241:17-
21	counsel sent a memorandum to Zlotnick	242:22 and Ex. 49 thereto,
22	regarding additional security agreements	Marquart Dec. Ex. B at 73-
23	between Zlotnick and the Band Entities	74, 103.
24	wherein he noted that the new agreements	
25	"indicate[]" that in addition to acknowledging	
26	the Coast Capital Security Agreement that	
27		
28		

1	you contest its validity.”	
2		
3	16. On or about April 3, 2001, Mickey	Zlotnick Tr. at pp. 223:9
4	Kaiserman, one of Band’s employees, faxed a	226:9 and Ex. 44 at 5405,
5	memo to Zlotnick regarding the CCP loan.	Marquart Dec. Ex. B at 68-
6	The memo attached more financial	71, 79.
7	statements, and stated that “during due	
8	diligence, I had copies of the Coast Capital	
9	Agreements in a binder for Greg Lipsker	
10	[Zlotnick’s lawyer] to review.”	
11		
12	17. The April 3, 2001 Kaiserman memo also	<i>Id.</i>
13	provided a chronology of the CCP loan	
14	agreements, explicitly listing the following:	
15		
16	(1) the original CCP loan agreement with	
17	Full Moon Universe, dated March 16, 2000;	
18		
19	(2) CCP’s consent to the Zlotnick loans of	
20	\$1.5 million (which expressly states that	
21	CCP’s loan is superior to Zlotnick’s); and	
22		
23	(3) a January 16, 20001 draft agreement	
24	(which extended the payment terms and	
25	contemplated CCP loaning additional	
26	amounts).	
27		
28		

1 2 3 4 5	18. Zlotnick alleges that sometime in 2000 or 2001, a conference was held between him, Band, and Walter Craig of CCP.	Zlotnick's Response to Interrogatory No. 1, p. 3:13-15, Marquart Dec. Ex. D at 168.
6 7 8 9 10 11	19. Zlotnick contends that the conference call happened just after he had already loaned various Band Entities at least \$1.5 million.	Final Pretrial Conference Order dated September 10, 2007 at p. 2:23-27 Marquart Dec. Ex. C at 122. (stipulated fact.)
12 13 14 15 16 17	20. Neither Craig nor Band recall the alleged conference call ever taking place.	Craig Dec., ¶ 7; Declaration of Charles Band dated August 10, 2007, Marquart Dec. Ex. H at 484.
18 19 20 21 22 23 24 25 26 27 28	21. Zlotnick alleges that during the conference call in 2000 or 2001, Craig, on behalf of CCP, made the following representations: (1) CCP stated that Zlotnick was "in pretty good shape" with his loan, although Zlotnick testified he felt this statement was more one of "opinion" than fact, and described it as "flowery talk." More	Zlotnick's Response to Interrogatory No. 7 at p. 7:8-24, Marquart Dec. Ex. D at 172; Zlotnick Tr. at pp. 55:3-64:23; 81:19-82:1; 84:17-85:7; 93:19-94:15; 97:18-98:6; 104:1-25; 106:5-25; 108:2-7; 130:4-23, Marquart Dec. Ex. B at 38-47, 54-55, 57-58, 59-60,

1	specifically, Zlotnick's discovery	61-62, 63, 64, 65, 67;
2	responses claim, "Mr. Craig validated or	Zlotnick's Complaint in
3	confirmed a statement from Mr. Band that	this matter dated December
4	Mr. Zlotnick's position was strong and	8, 2006 ("Complaint"), ¶ 7,
5	that he had nothing to worry about from	Marquart Ex. G at 473;
6	[CCP's] lien position."	Final Pretrial Conference
7		Order dated September 10,
8		2007 at pp. 3:23-4:1,
9	(2) CCP stated that there were "sufficient	Marquart Dec. Ex. C at
10	assets to cover both Mr. Zlotnick and	123.
11	CCP."	
12		
13	(3) CCP stated that its first-priority loan of	
14	approximately \$503,000 would be paid	
15	down by Band at the rate of approximately	
16	\$50,000 per month, and would thus be	
17	paid off in about ten months, at which time	
18	Zlotnick's loan would be in the "stronger	
19	position;"	
20		
21	22. Zlotnick testified that he and CCP never	Zlotnick Tr. at pp. 78:17-
22	entered into any agreement, either written or	79:7, Marquart Dec. Ex. B
23	oral, during or after the conference call.	at 53-53.
24		
25		
26	23. Zlotnick claims that his total investment	Zlotnick Tr. at pp. 24:2-4,
27	in the Band Entities was approximately \$2.3	Marquart Dec. Ex. B at 34;
28	million. Zlotnick's response to Interrogatory	Zlotnick's Response to

<p>No. 31 states "Mr. Zlotnick believes that the loans or financial statements he made after that conversation [the alleged 2000 or 2001 phone call among Zlotnick, Band and Craig] were between \$520,000 and \$870,000."</p>	<p>Interrogatory No. 31, Marquart Dec. Ex. F at 466-467.</p>
<p>24. In deposition, Zlotnick testified that he could not recall whether Mr. Craig stated that the CCP loan would not be re-advanced during the call.</p>	<p>Zlotnick Tr. at pp. 129:9-12, Marquart Dec. Ex. B at 66.</p>
<p>25. Zlotnick continues to assert the following three "claims" against CCP, all of which are premised upon the same alleged misrepresentations: (1) for fraud based upon the three alleged misrepresentations; (2) for subordination in equity based upon the factual predicate of the three alleged misrepresentations; and (3) for negligent misrepresentation based upon the three alleged misrepresentations.</p>	<p>Final Pretrial Conference Order dated September 10, 2007, ¶7(a)-7(c) at 3:15-7:25, Marquart Dec. Ex. C. at 123-127.</p>
<p>26. Shortly after the alleged conference call with CCP, Zlotnick learned that, contrary to Craig's purported representations, the CCP loan balance was actually remaining the same or increasing over time, rather than steadily</p>	<p>Zltonick Tr. at pp. 64:13-66:7, Marquart Dec. Ex. B at 47.</p>

1	decreasing.	
2		
3	27. Zlotnick regularly received financial	August 14, 2002
4	statements from mid-2000 to at least mid-	Deposition of Albert M.
5	2001 disclosing that CCP's loan balances with	Zlotnick in Case No.
6	Full Moon Universe were staying the same or	262183 at pp. 243:19-
7	increasing over time.	244:5, 244:20-246:16,
8		248:2-25; Exhibits 11, 12
9		and 14 thereto, Marquart
10		Dec. Ex. I at 488-493, 502,
11		512, 522; Zlotnick Tr. at
12		pp. 251:20-252:18, Exs. 48
13		and 50 thereto, Marquart
14		Dec. Ex. B at 75-76, 100,
15		115.
16		
17	28. At deposition, Zlotnick testified he	Zlotnick Tr. at pp. 73:5-
18	learned it was <i>not</i> true that CCP's loan would	74:12, Marquart Dec. Ex. B
19	be paid off in ten months merely "several	at 50-51.
20	months or a month" after the conference call,	
21	and that he certainly learned this fact during	
22	or before 2001.	
23		
24	29. On January 16, 2001, Band sent	McShane Tr. at pp. 19:2-
25	Zlotnick's counsel, Gregory Lipsker of	25:8 and Ex. 62 thereto,
26	Workland & Witherspoon, a draft of a	Marquart Dec. Ex. E at
27	proposed agreement stating that the CCP loan	
28		

1 2 3	"may be increased from time to time up to a maximum amount" of \$700,000.	203-209, 250.
4 5 6 7 8 9 10 11 12	30. Zlotnick's counsel in Los Angeles Superior Court Case No. BC262183 (the "Band Litigation"), Jim McShane, admitted that the January 16, 2001 memo from Band to Lipsker was produced to him more than three years prior to this action being filed and, in fact, questioned Mr. Lipsker about the document at his deposition in that matter. Mr. Lipsker authenticated the memo.	<i>Id.</i>
13 14 15 16 17 18 19 20	31. On November 19, 2002, Zlotnick's counsel in the Band Litigation sent a letter to counsel for the Band Entities stating: "We received the information requested on the status of the Coast Capital loan. It appears that the balance due is over \$563,000."	Zlotnick Tr. at pp. 257:3-258:14 and Ex. 52 thereto, Marquart Dec. Ex. B at 77-78, 118.
21 22 23 24 25 26 27	32. A handwritten checkmark appears next to the above-quoted paragraph. Zlotnick testified as follows: Q: And I want to point you to the second check mark from the bottom.	<i>Id.</i>

1 A: Yes.

2
3 Q: You can read for the record. Is that your
4 check mark?

5
6 A: Yes.

7
8 Q: Okay. Reading the record next to the
9 right of the second check mark, quote:

10
11 "We received the information requested on
12 the status of the Coast Capital loan. It appears
13 that the balance due is over 563,000 dollars."

14 Do you see that, Sir?

15
16 A: Yes, I do.

17
18 Q: That statement is inconsistent with your
19 understanding of what Mr. Craig told you in
20 the conference call, that the Coast Capital
21 loan would only go down; is that correct?

22
23 A: Correct.

24
25 33. In October 2000, Zlotnick received a set
26 of financial documents for Full Moon
27 Universe which disclosed an interest rate of

August 14, 2002
Deposition of Albert M.
Zlotnick in Case No.

<p>20-24% for the CCP loan.</p>	<p>262183 at pp. 248:8-25 and Ex. 14 thereto at ZL0278, Marquart Dec. Ex. I at 493, 522.</p>
<p>34. On November 20, 2001, Zlotnick commenced the Band Litigation. Paragraph 127 of his First Amended Complaint in that action states:</p> <p>“Plaintiff is informed and believes and on that basis alleges that at all material times iSurrender, Full Moon California and Full Moon Washington had liabilities in excess of their assets, that they were unable to pay their debts as they became due in the ordinary course of business, and that they were insolvent.”</p>	<p>Band FAC, ¶ 127, CCP’s Request for Judicial Notice Ex. B.</p>
<p>35. Numerous documents were produced to Zlotnick’s litigation counsel in connection with the Band Litigation at least three years prior to this lawsuit. These included: (1) all of the loan documents and amendments between CCP and the Band Entities and (2) correspondence between Zlotnick’s counsel</p>	<p>McShane Tr. at pp. 14:2-15:15; 17:14-18:11; 26:5-27:7; 31:4-32:8; 32:12-33:9; 33:17-34:9; 34:14-35:9; 38:2-39:2; 57:1-58:4, and Exs. 61, 67-70, and 75 thereto, Marquart Dec. Ex.</p>

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17	and Band or Kaiserman documenting CCP's loan agreements and UCC filings. (Facts Nos. 29-30.) According to Zlotnick's counsel in the Band Litigation, Jim McShane of Sheppard Mullin: (a) documents bearing Bates stamp prefixes of "WW" were produced to him by Workland and Witherspoon, most likely in the middle of 2002 but certainly prior to August 2003; (b) documents bearing Bates stamp prefixes of "ZL" were given to him from Zlotnick himself, also most likely in the middle of 2002 but certainly prior to August 2003; and, (c) those bearing Bates stamp prefixes of "CB" were produced by Band to him on or before Band's deposition in April 2003.	E at 198-199, 201-202, 210-211, 215-219, 222-223, 238-239.
18 19 20 21 22 23 24	36. According to Zlotnick's counsel in the Band Litigation, the aforementioned documents were most likely produced sometime in the middle of 2002, but certainly prior to August, 2003.	McShane Tr. at pp. 14:2-17:7, 19:5-23:25; 26:5-27:7; 38:2-39:2, Marquart Dec. Ex. E at 198-201, 203-207, 210-211, 222-223.
25 26 27 28	37. Zlotnick was deposed in the Band Litigation in or around August, 2002. At such time, he testified that he was already aware of	August 14, 2002 Deposition of Albert M. Zlotnick in Case No.

1 the "revolving" nature of the CCP loan:

262183 at pp. 314:10-315:

2
3 A:... I recall, and I don't know if it was then
4 or maybe a little bit later, there was a
5 statement put out that Coast Capital was owed
6 approximately \$503,000.

3, Marquart Dec. Ex. I at
495-496.

7
8 Q: Okay.

9
10 A: There was a footnote to that statement
11 saying that... Full Moon will repay that loan
12 to the extent of either 50,000 a month,
13 something like that.

14
15 Q: Right.

16
17 A: And I wanted to be reassured by Charlie
18 that that was happening, and it was an
19 absolute footnote that the company entered
20 into.

21
22 Q: That the company was paying back the
23 Coast Capital –

24
25 A: 50,000 a month. As I learned later on,
26 they paid it back and took it out again.
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<p>Q: They paid it back and took it out again.</p> <p>A: Yeah.</p>	
<p>38. On April 24 and 25, 2003, Zlotnick's counsel in the Band Litigation deposed Band on the issue of CCP's loans. With Zlotnick present, Band explained that, in addition to the approximate \$500,000 loan to Full Moon Universe, CCP had also made loans to other entities controlled by Band, such as Shadow Entertainment (which loan had a "face amount" that Band estimated at \$800,000 to \$900,000). Band noted that these loans were personally guaranteed and secured by a mortgage on his Italian castle. To clarify, counsel asked Band, "Just so I'm clear, that 8- or \$900,000 is separate from and in addition to the \$500,000. . . loan that was made to Full Moon?" Band responded, "Correct."</p>	<p>Deposition of Charles Band dated April 25, 2003 at pp. 3:9, 89:4-90:11, Marquart Dec. Ex. J at 527, 529-530; McShane Tr. at pp. 42:2-43:11, Marquart Dec. Ex. E at 226-227.</p>
<p>39. In its November 19, 2002 letter to opposing counsel in the Band Litigation, Zlotnick's counsel also asked for various financial information regarding Shadow Entertainment and, on December 16, 2002, opposing counsel provided detailed bank</p>	<p>McShane Tr. at pp. 44:10-45:23 and Ex. 72 thereto, Marquart Dec. Ex. E at 228-229, 313-343.</p>

1	statements for both Full Moon Universe and	
2	Shadow Entertainment.	
3		
4	40. On or before September 3, 2003,	McShane Tr. at pp. 57:1-
5	Zlotnick's counsel in the Band Litigation	58:5 and Ex. 75 thereto,
6	compiled a separate file dedicated to the CCP	Marquart Dec. Ex. E at
7	loan transactions, containing copies of all the	238-239, 344-462.
8	CCP loan documents and amendments	
9	thereto.	
10		
11	41. In or around August, 2003, the Band	McShane Tr. at pp. 10:10-
12	Litigation settled when Band stipulated to a	12:10 and Ex. 58 thereto,
13	\$2 million judgment in favor of Zlotnick.	Marquart Dec. Ex. E at
14		194-196, 240.
15		
16	42. On or about April 30, 2004, Zlotnick sued	Complaint against
17	Workland & Witherspoon, his transactional	Workland & Witherspoon
18	counsel in connection with his loan to the	in Case No. CV-04-0140-
19	Band Entities.	AAM dated April 30, 2004,
20		CCP's Request for Judicial
21		Notice Ex. C.
22		
23	43. Zlotnick's complaint against Workland &	<i>Id.</i> , ¶ 3 (at ¶ 17).
24	Witherspoon alleged, among other things, that	
25	the firm had committed malpractice by failing	
26	to identify prior obligations of the Band	
27	Entities from predecessor creditors and failing	
28		

1	properly to secure Zlotnick's loans.	
2		
3	44. Zlotnick's complaint against Workland &	<i>Id.</i> , ¶ 3 (at ¶¶ 26, 26, and
4	Witherspoon further alleged that as a result of	31).
5	the firm's malpractice, Zlotnick's judgment	
6	against Band in the Band Litigation was	
7	"uncollectible," and that as a result, Zlotnick	
8	had to "seek the full amount of his damages	
9	from the Workland & Witherspoon	
10	defendants in order to make himself whole."	
11		
12	45. Zlotnick settled with the Workland &	Zlotnick's August 14, 2007
13	Witherspoon defendants for \$1.4 million.	Responses to CCP's
14		Second Set of
15		Interrogatories, Response
16		to Interrogatory No. 27,
17		Marquart Dec. Ex. F at
18		465.
19		
20	46. In connection with Zlotnick's suit against	Craig Dec. ¶ 7; Deposition
21	Workland & Witherspoon, CCP was asked to	of Walter Craig dated July
22	produce documents and Craig was deposed in	25, 2007 ("Craig Tr.") at
23	2005. CCP complied with both requests,	pp. 88:5-19 and Exs. 8 and
24	making all of its files available in the manner	9 thereto, Marquart Dec.
25	in which they were maintained prior to	Ex. A at 7, 25-28.
26	Craig's deposition. One of the documents	
27	produced was a memorandum from Craig to	
28		

1	Band, dated January 22, 2001.	
2		
3	47. The January 22, 2001 memo from Craig	Craig Tr. at pp. 88:23-
4	to Band was in response to a request from	90:18 and Exs. 8 and 9
5	Band to loan an additional \$200,000 to Full	thereto, Marquart Dec. Ex.
6	Moon Universe.	A at 7-9, 25-28.
7		
8	48. The memorandum proposed that if	Craig Tr. at pp. 93:15-
9	Zlotnick consented to the additional loan,	94:22 and Exs. 8 and 9
10	CCP would agree to subordinate \$100,000 of	thereto, Marquart Dec. Ex.
11	the additional loans to Zlotnick's loans. In	A at 13-14, 25-28.
12	addition, Craig proposed that Zlotnick loan	
13	Full Moon Universe an additional \$50,000,	
14	which would be on a <i>pari-passu</i> basis with	
15	another \$50,000 loan by Zlotnick.	
16		
17	49. A draft letter agreement setting forth	Craig Tr. at pp. 101:6-
18	these terms was attached to the January 22,	102:7 and Exs. 8 and 9
19	2001 memo. This letter agreement was never	thereto, Marquart Dec., Ex.
20	agreed to.	A at 21-22, 25-28.
21		
22	50. The January 22, 2001 memorandum also	Exs. 8 and 9 to Craig Tr.,
23	stated:	Marquart Dec. Ex. A at 25.
24		
25	"When you next speak with Al [Zlotnick],	
26	don't suggest <u>at all</u> that you have gotten CCP	
27	to provide additional funding. Keep him	
28		

1	thinking you are in desperate need of funding	
2	to meet immediate needs.”	
3		
4	51. Craig explained that he wrote the above-	Craig Dec., ¶ 8.
5	quoted language because CCP had not agreed	
6	to any additional funding at that point in time	
7	and it was, in that memo, important to him to	
8	make sure Mr. Band did not over-simplify to	
9	Mr. Zlotnick the problems and cash	
10	challenges Band and his companies were	
11	experiencing. Craig did not want Mr. Band to	
12	give Mr. Zlotnick the impression that CCP’s	
13	additional loans were already agreed to by all	
14	parties.	
15		
16	52. The January 22, 2001 memo is the only	Zlotnick’s Response to
17	document Zlotnick has identified as	Interrogatory No. 12 at pp.
18	supporting his causes of action for fraudulent	10:9-20, Marquart Dec.,
19	and/or negligent misrepresentation or his last	Ex. D at 175.
20	claim for avoidance or subordination.	
21		
22	53. In his portion of the Pre-Trial Conference	Final Pretrial Conference
23	Order, Zlotnick contends that prior to learning	Order dated September 10,
24	about the existence of this memo, “Mr.	2007 at p. 7:21-23,
25	Zlotnick had no reason to believe that Mr.	Marquart Dec. Ex. C at
26	Craig would intentionally misrepresent	127.
27	information to Mr. Zlotnick, nor that Mr.	
28		

Craig had intentionally and tortiously
concealed information from Mr. Zlotnick.”

II.

CONCLUSIONS OF LAW

A. Zlotnick's Claims Are Time-Barred

1. Zlotnick filed this action on December 8, 2006. On September 10, 2007, Zlotnick abandoned all of his claims except for (a) a fraud claim, (b) a request for “equitable” subordination or avoidance based upon the same fraudulent conduct, and (c) negligent misrepresentation based upon the same misrepresentations as his fraud claim. The maximum applicable statute of limitations for all of these claims is provided by California Code of Civil Procedure section 338(d), which sets a three-year limitations period for “[a]n action for relief on the ground of fraud or mistake.” Caselaw establishes that the limitations period begins to run the moment “the plaintiff suspected or should have suspected that an injury was caused by wrongdoing.” *Kline v. Turner*, 87 Cal. App. 4th 1369, 1374 (2001). *See also Snapp & Associates v. Malcolm Bruce Burlingame Robertson*, 96 Cal. App. 4th 884, 891 (2002) (“...a *suspicion* of wrongdoing, coupled with a knowledge of the harm and its causes, commences the limitations period [emphasis in original]”); *Meadows v. Bicrodyne Corp.*, 785 F.2d 670, 672 (1986) (“[f]ailure to discover the details of the fraud does not prevent the statute from running”). Since Zlotnick was aware of his alleged injury and also aware that CCP’s alleged representations were false *more* than three years prior to filing suit, and since Zlotnick actually accused another party, Charles Band, of making some or all of the

1 same misrepresentations as alleged herein against CCP more than four years prior
2 to this lawsuit, his actions are time-barred.

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4 2. As it is predicated on a purported misrepresentation (Fact No. 25),
5 Zlotnick's "equitable" subordination claim should similarly be barred by Code of
6 Civil Procedure section 338's three-year statute of limitation.

7
8 **B. Zlotnick Could Not Have Justifiably Relied on Any of CCP's Purported**
9 **Misrepresentations**

10 1. Zlotnick's negligent and intentional misrepresentation claims both
11 include as elements that the plaintiff *justifiably* relied on a misrepresentation of
12 material fact, to his detriment. *See Alliance Mortgage Co. v. Rothwell*, 10 Cal. 4th
13 1226, 1239, fn. 4 (1995). Here, Zlotnick, a sophisticated investor with over forty
14 years of investment banking experience, alleges that, based solely on Craig's
15 alleged statements during the purported conference call, Zlotnick "advanced
16 significant sums one [sic] or more Judgment Debtors." (Complaint, ¶ 49; Zlotnick
17 Response to Interrogatory No. 9).

18 Whether a party's reliance on a particular statement or representation was
19 justified "may be decided as a matter of law if reasonable minds can come to only
20 one conclusion based on the facts." *Guido v. Koopman*, 1 Cal. App. 4th 837, 843
21 (1992). In determining whether reliance was justified, the plaintiff's "knowledge,
22 education, and experience" must be considered. *Id.* at 844. Where sophisticated
23 parties have engaged in complex business transactions, courts typically apply a
24 stiffer threshold in determining whether reliance on a particular representation was
25 justifiable under the circumstances. *See Pacific MDF Products, Inc. v. Bio-Mass*
26 *Energy Concepts, LLC*, 2006 WL 3359211 (E.D. Cal. 2006) (CEO not entitled to
27 rely on oral statements of other party during contract negotiations, where no
28

1 independent effort made to investigate claims); *General American Life Insurance*
 2 *Co. v. Castonguay*, 984 F.2d 1518 (9th Cir. 1993) (plaintiff insurance company
 3 could not justifiably rely on trust agent's assurances "that the trust was solvent but
 4 that no financial statements were available," as plaintiff could have investigated
 5 statement's veracity but did not do so). *See also Wilhelm v. Pray, Price, Williams*
 6 *& Russell*, 186 Cal. App. 3d 1324, 1332 (1986) (unreasonable as a matter of law to
 7 rely on representations of adversary's counsel without an independent inquiry).

8
 9 2. Although the legal theory underlying Zlotnick's avoidance cause of
 10 action is unclear, it appears to be based on the same alleged fraudulent intent as his
 11 misrepresentation claims. (Complaint ¶ 29, 30 ("Plaintiff alleges that Defendants
 12 and [Band Entities] entered into and engaged in a civil conspiracy to defraud
 13 Plaintiff"), 31 ("such transfers were intentionally not disclosed or intentionally
 14 concealed from Plaintiff"); Marquart Dec. Ex. 477-478). Since Zlotnick's could
 15 not have justifiably relied on any of CCP's alleged misrepresentations, his
 16 avoidance claim fails for the same reasons.

17 **C. Zlotnick Has No Evidence of Fraudulent Intent of Negligence**

18 Zlotnick's only proffered evidence of intent – the January 2001
 19 memorandum from Craig to Band – does not as a matter of law raise any reasonable
 20 inference that CCP *knowingly* or *negligently* made representations to Zlotnick,
 21 required elements of each of Zlotnick's claims.

22 As the draft agreement attached to the memo explains, CCP was actually *not*
 23 willing to loan significant additional funds unless and until Zlotnick made
 24 additional loans, and that is why Craig did not want Band to suggest otherwise.
 25 Craig has explained that he wrote the above-quoted language because CCP had not
 26 agreed to any additional funding at that point in time and it was, in that memo,
 27 important to him to make sure Mr. Band did not over-simplify to Mr. Zlotnick the
 28 problems and cash challenges Band and his companies were experiencing. (Fact

1 No. 51.) Craig did not want Mr. Band to give Mr. Zlotnick the impression that
 2 CCP's additional loans were already agreed to by all parties. (Id.) Moreover, if
 3 anything, Craig was asking Band to present a more *negative* financial picture of the
 4 Band Entities, not the rosy one Zlotnick claims Craig "fraudulently" presented in
 5 the conference call. In addition, the memo mentions that Craig was willing to
 6 suggest being in *pari passu* (in equal right of repayment) as to a small portion of the
 7 contemplated additional loans, contradicting any notion that CCP had ever
 8 previously suggested or agreed that it would subordinate any of its position.

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 10
 11 Dated: September 21, 2007

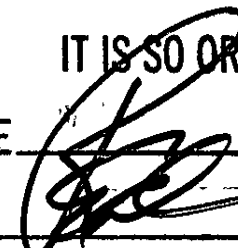
BAKER MARQUART CRONE &
 HAWXHURST LLP

12
 13 By


 Jaime W. Marquart
 Attorneys for Defendant
 Coast Capital Partners, LLC

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 20 IT IS SO ORDERED

21 DATE

 Oct. 23, 2007

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 23 U.S. DISTRICT COURT JUDGE